Supreme Court, U.S.
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No. 92-917

In The
Supreme Court of the United States
October Term, 1992

SPENCER GIFTS, INC.,

Petitioner,

v.

JOHN D. OLITSKY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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December 30, 1992

PARTIES TO THE PROCEEDING

The cross-petition for a writ of certiorari (page ii) correctly identifies the parties before the court of appeals and this Court as well as the parties required to be identified by Rule 29.1 of this Court's rules.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

REASONS FOR DENYING THE PETITION 2

CONCLUSION 4

TABLE OF AUTHORITIES

CASES **Page**

Blum v. Witco Chem. Corp.,
829 F.2d 367 (3d Cir. 1987) 2

Cassino v. Reichhold Chems., Inc.,
817 F.2d 1338 (9th Cir. 1987),
cert. denied, 484 U.S. 1047 (1988) 2

Cooper v. Asplundh Tree Expert Co.,
836 F.2d 1544 (10th Cir. 1988) 2, 3

Dominic v. Consolidated Edison Co. of New York, Inc.,
822 F.2d 1249 (2d Cir. 1987) 2

Graefenhain v. Pabst Brewing Co.,
870 F.2d 1198 (7th Cir. 1988) 2, 3

Wheeler v. McKinley Enters.,
937 F.2d 1158 (6th Cir. 1991) 2

Transworld Airlines v. Thurston,
469 U.S. 111 (1985) 4

STATUTES

29 U.S.C. § 216(b) 2, 3
29 U.S.C. § 626(b) 2, 3

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Brief In Opposition to Cross-Petition For Certiorari

Petitioner, Cross-Respondent Spencer Gifts, Inc., opposes the request for a writ of certiorari by Respondent, Cross-Petitioner John D. Olitsky to review the Opinion and Order of the United States Court of Appeals for the Fifth Circuit, rendered on June 22, 1992.

OPINIONS BELOW

The cross-petition for a writ of certiorari (page 1) correctly identifies the relevant opinions and judgments delivered in the district court and the court of appeals.

JURISDICTION

The cross-petition for a writ of certiorari (page 2) correctly identifies a basis for invoking this Court's jurisdiction.

REASONS FOR DENYING THE PETITION

There is no reason for this Court to grant Olitsky's cross-petition for a writ of certiorari. With the Fifth Circuit's decision there are now seven circuits that have considered the issue, and all have agreed that under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b), and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), an award of front pay in an age discrimination case is not subject to doubling. Thus there is no warrant for review by this Court of this pure question of statutory construction.

When presented with the issue of whether the district court erred in refusing to double its award of front pay to Olitsky, the Fifth Circuit correctly noted that six other circuits had rejected the argument that a front pay award constitutes an "amount owing" under the liquidated damages provision of the ADEA. Pet. App. at 18a, *citing Wheeler v. McKinley Enters.*, 937 F.2d 1158, 1163 n. 2 (6th Cir. 1991); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1210 (7th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1556-57 (10th Cir. 1988); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 382-83 (3d Cir. 1987); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1258 (2d Cir. 1987); and *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1348-49 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988). As Olitsky concedes, no court of appeals faced with this issue has ruled to the contrary. Cross-Petition at 3.

As the Tenth Circuit has explained:

> Parsing the statutory language of § 626(b) reveals that it provides two types of relief. First is "*amounts owing*" as unpaid wages or unpaid overtime compensation. Section 216(b) instructs that the items to be doubled as liquidated damages are unpaid wages or unpaid overtime compensation. Thus for a monetary award to qualify for doubling as liquidated damages it must be an 'amount owing' under § 626(b).
>
> The second type of relief permitted, including front pay, is not found in the 'amounts owing' provision of § 626(b) but in the following sentence: '[T]he court shall have jurisdiction to grant such *legal or equitable* relief as may be appropriate . . . .' We have said that this sentence 'makes a significant addition to the FLSA remedies' referred to by the 'amounts owing' language. Because the authority to grant front pay as a remedy stems from the additional power to grant appropriate legal and equitable relief, we conclude that the statute does not contemplate the doubling of front pay awards as liquidated damages in cases of willful violations.

Cooper, 836 F.2d at 1556 (citations omitted) (emphasis in the original); *see also Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1210 (7th Cir. 1988) ("ADEA's liquidated damages provision provides that only 'amounts owing' as a result of a willful violation may be doubled. Since front pay is a prospective remedy, an award of front pay damages is not an 'amount owing' for purposes of section 626(b).")

As evident from the above-quoted passage, the view of the courts of appeals is that the issue is simply a matter of statutory construction. Those courts have held that as a matter of

grammar and context, the phrase "amounts owing" includes only unpaid wages and unpaid overtime. The fact that this Court has ruled that liquidated damages awarded pursuant to the ADEA are punitive, *see Transworld Airlines v. Thurston*, 469 U.S. 111, 125 (1985), does not mean that a court may add an element of punishment to the ADEA for which Congress did not provide.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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